U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11913218

DATE: OCT. 1, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, an automotive supplier, seeks to employ the Beneficiary as a "Buyer II-Program." It requests advanced degree professional classification for the Beneficiary under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the grounds that the evidence of record did not establish that the Beneficiary had the requisite qualifying experience to meet the terms of the labor certification and to be eligible for classification as an advanced degree professional.

On appeal the Petitioner submits additional documentation and asserts that the evidence of record establishes that the Beneficiary has the requisite experience to qualify for the proffered position under the terms of the labor certification and to qualify for the requested visa classification.

In visa petition proceedings it is the Petitioner's burden to establish eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

The term "advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The regulations at 8 C.F.R. § 204.5(k)(3)(i) state that a petition for an advanced degree professional must be accompanied by either:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date,[1] which in this case is July 3, 2019. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

II. ANALYSIS

The labor certification in this case specifies the following in section H (Job Opportunity Information) regarding the requirements for the position of Buyer II-Program:

4.	Education: Minimum level required:	Master's degree
4-A.	Major field of study	Industrial Engineering, Business Administration, or related field
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	24 months
8.	Is an alternate combination of education and experience acceptable?	Yes
8-B.	What alternate combination?	Bachelor's degree plus 5 years of progressive post-bachelor's experience in commodity purchasing
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	Yes
10-A.	How long?	60 months
10-B.	What job title(s)?	Buyer, Program Buyer, Purchasing Agent, and related occupations
14.	Specific skills or other requirements:	

[1] The priority date of a petition is the date the underlying labor certification was filed with the DOL. 8 C.F.R. § 204.5(d).

One year of qualifying commodity purchasing experience must include experience with Axalant, SupplyOn, and SAP.

Thus, the minimum educational and experience requirements of the labor certification are either: (1) a U.S. master's or foreign equivalent degree in one of the referenced academic fields plus two years of experience in one of the referenced occupations (including one year of experience with Axalant, SupplyOn, and SAP), or (2) a U.S. bachelor's or foreign equivalent degree in one of the referenced academic fields plus five years of post-baccalaureate experience in one of the referenced occupations (including one year of experience with Axalant, SupplyOn, and SAP). The Petitioner asserts that the Beneficiary meets the labor certification's alternate requirements of a bachelor's degree and five years of qualifying experience, as well as the additional requirements in H.14.

The record includes copies of the Beneficiary's transcript and diploma from the [redacted] in Brazil, showing that she was awarded a *Bacharel em Administracao* (Bachelor of Administration) after completion of a four-year academic program on August 21, 2012. We find that this Brazilian degree is equivalent to a U.S. bachelor's degree in business administration. As such it meets the alternate educational requirement of the labor certification.

Since the Beneficiary's qualifying educational credential is a bachelor's degree, she must have had five years of qualifying post-baccalaureate experience by the petition's priority date of July 3, 2019, to meet the minimum experience requirement for classification as an advanced degree professional, as provided in 8 C.F.R. § 204.5(k)(3)(i)(B). In sections J and K of the labor certification the Petitioner asserts that the Beneficiary has more than five years of qualifying experience by virtue of her employment as a Buyer with an affiliated company, [redacted] in [redacted] Brazil, from October 18, 2010, to March 1, 2018. According to the labor certification the Beneficiary began working for the Petitioner on March 2, 2018, in the position of Buyer II-Program, which is not qualifying experience.[2]

As its initial evidence of the Beneficiary's experience with [redacted] the Petitioner submitted a letter from the company's director of materials management which stated that the Beneficiary was employed as a Buyer from October 18, 2010, to March 1, 2018,[3] the last three years of which (as of March 1, 2015) she was physically located in the United States. As pointed out by the Director in his request for evidence (RFE), however, the Beneficiary's nonimmigrant visa (NIV) application in August 2016 indicated that she was already employed by the Petitioner[4] at that time and that her employment dates

[2] Section J.21 of the labor certification indicates that the Beneficiary did not gain any qualifying experience with the Petitioner in a position substantially comparable to the proffered position in this proceeding.

[3] The letter listed the Beneficiary's job duties and stated that her experience included the use of Axalant, SupplyOn, and SAP, as required in section H.14 of the labor certification.

[4] The Beneficiary was admitted to the United States on an L1 visa (Intracompany Transferee) in accordance with 8 C.F.R. § 214.2(l)(1), which states that "Under section 101(a)(15)(L) of the Act, an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge."

with [redacted] were from January 15, 2010, to February 1, 2015. A subsequent NIV application in August 2018 to extend the Beneficiary's stay in the United States indicated slightly different dates for her employment with [redacted] from February 15, 2010, to February 28, 2015. The foregoing dates also differ from the employment dates indicated in the labor certification and the letter from [redacted] In the RFE the Director requested an explanation for these conflicting dates of employment along with supporting documentation.

In response to the RFE the Petitioner reiterated its contention that the Beneficiary was still employed by [redacted] during the first three years of her work in the United States – from March 1, 2015, to March 1, 2018. The Petitioner submitted income tax records of the Beneficiary's pay from [redacted] These records only covered the years 2010-2015, however, and therefore failed to show that [redacted] continued to employ the Beneficiary in the years up to 2018. The Petitioner also submitted a letter from its global mobility specialist who acknowledged that during the Beneficiary's "expatriate assignment" in the United States from March 1, 2015, to March 1, 2018, she was paid by the Petitioner pursuant to the terms of her "expatriation contract."

The Director determined that the evidence of record did not establish that the Beneficiary continued to be employed by [redacted] after her move to the United States for her expatriate assignment with the Petitioner in early 2015. As a result, the Beneficiary only gained qualifying post-baccalaureate experience with [redacted] during the 30-month time period after the date of her bachelor's degree on August 21, 2012,[5] and before the start of her work in the United States with the Petitioner around March 1, 2015. Since the Beneficiary did not have at least five years of qualifying experience to combine with her bachelor's degree, the Director concluded that she did not meet the alternate experience requirement of the labor certification and was not eligible for advanced degree professional classification.

On appeal the Petitioner submits a copy of the "Expatriation Contract" between [redacted] ("acting on behalf of itself and the [Petitioner]") and the Beneficiary, dated February 20, 2015. According to the Petitioner the contract confirms that the Beneficiary remained an employee of [redacted] from March 1, 2015, to March 1, 2018. In support of this claim the Petitioner points out that the contract was signed by [redacted] and the Beneficiary; that the contract makes [redacted] responsible for the cost of securing the Beneficiary's work authorization in the United States, for determining the variable compensation system for the Beneficiary, for paying a reference salary[6] and any necessary taxes to the U.S. Internal Revenue Service (IRS), for ensuring insurance coverage for the Beneficiary, and for helping her find housing in the United States; and that the contract gives [redacted] the right to terminate the Beneficiary's underlying employment contract. Notwithstanding these claims, we

[5] Experience that predates the awarding of the Beneficiary's bachelor's degree is not qualifying experience in this petition for advanced degree professional classification because it is not "post-baccalaureate experience" as required by 8 C.F.R. § 204.5(k)(3)(i)(B). Thus, the Beneficiary's experience with [redacted] in the time period up to August 21, 2012, is not qualifying experience.

[6] Section 4 of the contract provides that [redacted] will maintain a "reference salary" in Brazilian currency corresponding to the Beneficiary's dollar compensation in the United States, a "fictive salary progression" which will "serve as a basis for the [Beneficiary's] salary determination upon [her] reintegration after the assignment abroad," as well as "the basis for entitlements in the company pension scheme." Thus, no Brazilian salary is actually paid to the Beneficiary under the contract.

determine that the contract does not confirm that [redacted] remained the Beneficiary's employer once the Beneficiary began working for the Petitioner.

Section 2.1 of the contract states that the Beneficiary's worksite during the contractual period is [redacted], South Carolina, USA, and that the Petitioner is entitled to assign the Beneficiary to another workplace consistent with the Beneficiary's qualifications. Section 2.1 also provides that the Beneficiary's employment agreement of October 18, 2010, with [redacted] "shall be dormant during the term of this contract and shall be reactivated upon return to Brazil." Section 2.2 states that "[t]he person entitled to issue instructions to [the Beneficiary] is the Senior Purchasing Manager of the [Petitioner]," and that "[this person] is the functional as well as disciplinary supervisor of the [Beneficiary]." Section 2.3 states that the effective date of the contract is March 1, 2015, has a term of three years, and may be extended by mutual agreement for another two years maximum. Section 3.1 provides that as of March 1, 2015, the Beneficiary will receive her salary from the Petitioner. Section 22 states that "[a]fter ending the international transfer . . . [redacted] is willing to reintegrate the Beneficiary] into the [redacted] in Brazil . . . subject to [her] entering [redacted] immediately following completion of the activity in the country of assignment."

While the "Expatriation Contract" indicates that some ties remained between [redacted] and the Beneficiary during the contract's operational period, the contract provisions discussed above make clear that the Petitioner became the Beneficiary's employer when the contract came into force on March 1, 2015. This conclusion is bolstered by the fact that the Beneficiary identified the Petitioner as her employer on the NIV applications of August 2016 and August 2018 referenced in the Director's decision. Those NIV applications specifically identified [redacted] as the Beneficiary's previous employer from 2010 to early 2015, stated that the Beneficiary's initial L1 visa was approved on January 30, 2015, and that she first entered the United States on February 6, 2015, and specifically identified the Petitioner as the Beneficiary's current employer in August 2016 and August 2018, respectively.

The Petitioner has not explained the basis of its assertion that the Beneficiary remained an employee of [redacted] until March 1, 2018, and on March 2, 2018, became an employee of the Petitioner. The only significance of those dates appears to be that the "Expatriation Contract" had an initial three-year validity period from March 1, 2015, and could be extended on March 1, 2018, for another two years. But the terms of that contract indicate that the Beneficiary became an employee of the Petitioner when the contract took effect in 2015, and the nature of their relationship did not change with the contract extension in 2018.

III. CONCLUSION

The record establishes that the Beneficiary was employed by [redacted] as a Buyer from 2010 (the starting date was probably October 18, 2010, based on the Expatriation Contract, the letter from [redacted] and the Beneficiary's income tax records) until early 2015. The Beneficiary only gained qualifying experience, however, during the two and a half year period after her bachelor's degree was awarded on August 21, 2012, until she departed Brazil in February 2015 and began her employment with the Petitioner on March 1, 2015. While the Beneficiary did meet the specific skills requirements

of section H.14 of the labor certification, she did not gain five years of qualifying experience, as required in section H.10, by the petition's priority date of July 3, 2019. Therefore, the Beneficiary does not meet the alternate experience requirement of the labor certification (in combination with her bachelor's degree) and is not eligible for advanced degree professional classification under 8 C.F.R. § 204.5(k)(3)(i)(B). The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.